The Medical Model versus the Just Deserts Model

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This paper traces the history of two models that have been influential in shaping modern views toward criminals. One of these two—the medical model—is based on the concept of rehabilitation, that is, treatment predicated on the attributes of the offender. The second of these two—the just deserts model—centers on retribution, that is, punishment deserved for the seriousness of the crime. Each model has been dominant in various periods of history.

Today, the medical model, although still accepted as desirable, has been dethroned from its position of dominance. The just deserts model, with its emphasis on retributive equivalences and appropriate punishment, is steadily gaining broad acceptance. A principal rationale of just deserts is proportional sentencing, in which equal punishment for equal crime means not that the punishment should be exactly like the crime, but that the ratios of sanction severity should have a corresponding set of ratios of crime seriousness.

Just deserts refers to retribution—punishment that is deserved for the seriousness of the crime. The medical model refers to rehabilitation—treatment based on the attributes of the offender.

I shall march quickly though some history of these two models and shall try to reconcile them in the penology of today. Let me preface this essay with my personal and professional proclivities: I embrace the just deserts model; I am strongly supportive of noncoercive treatment programs; I am against long sentences and in favor of community programs as alternatives to imprisonment. I oppose the death penalty. Let us now begin with the substance of my treatise.

The Classic School Position

The major purposes of punishment historically have been retribution, expiation, deterrence, reformation, and social defense. Throughout history, an eye for an eye, the payment of one's debt to society by expiation, general deterrence of crime by exemplary punishment and specific or special deterrence of an individual offender, reformation of the in-

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dividual so that he or she will not commit further crime, and protection of society against criminality by detaining or imprisoning offenders have been the principal rationales for disposition of criminal offenders.

Periods in history gave dominant position to each of these penal purposes. The Hammurabi Code was a brilliant civilizational advance in 1700 BC with its emphasis on retribution, the call for talion, partly because it represented an attempt to keep cruelty within bounds.

Hammurabi's Code, however, did not always observe the strict proportionality often attributed to it, that is, approximating the punishment to the crime. Professor James B. Pritchard,[1] of the University of Pennsylvania, reminds us that, if a noble has destroyed the eye of another noble, his eye shall be destroyed; if he has broken the bone of another noble, "they shall break his bone," and if he has knocked out the teeth of a noble "of his own rank, they shall knock out his teeth." But if the victim was not a noble, the punishment was a fine, as was the case of a commoner striking the cheek of a commoner. If a noble struck the cheek of a noble of higher rank, he received 60 lashes with an oxtail whip. Striking a noble of equal rank resulted in a fine. But if a slave struck a noble, off came his ear; if a son struck his father, the son's hand was cut off.

The Law of Moses is usually claimed to be retributive, based on the principle of an eye for an eye but, as Princeton's Professor Walter Kaufman[2] points out in *Without Guilt and Justice*, careful reading of Exodus, Leviticus, Numbers, and Deuteronomy may show that the phrase appears three times, but that the utilitarian notion of deterrence is also present, as in Deuteronomy 19: "The rest shall hear and fear, and shall never again commit any such evil in your midst."

Moreover, it has been asserted that, even with the rationale of retribution, with an effort to produce a kind of equilibrium or homeostasis, the meaning of an eye *under* an eye refers to the letters of the Hebrew alphabet and that the letters preceding the "eye," *ayian tachat ayian*, spell money, which is interpreted as monetary compensation or restitution to the victim by the offender.[3] The Talmud makes a clear effort to avoid the literal translation. Now this interpretation is, from my viewpoint, extremely important because it raises the issue of *retributive equivalences*. The claim is, therefore, that corresponding and proportional sanctions—that is, the punishment proportionate to the crime—even with precision is possible without requiring *exactly* the same pain. Similarity, not sameness, becomes the consequence of equivalences. This principle becomes more important with respect to the death penalty, as I shall remark later.

Although Socrates, through Plato, and Aristotle were more future oriented than past oriented relative to punishment, Plato in particular also refers to retribution as just deserts. Deterrence is future minded, meant to cause others or the same offender from committing crimes in the future. To punish offenders for what they have done and not what they might do in the future is, of course, past oriented. To punish offenders based on what they deserve to receive is retribu-

tive. Plato (427–347 BC) said:

> But if anyone seems to deserve a greater penalty, let him undergo a long and public imprisonment and be dishonored. . . . No criminal shall go unpunished, not even for a single offense . . . *let the penalty be according to his deserts* . . . [emphasis added].[4]

Plato sounds quite modern:

> When a man does another any injury by theft or violence, for the greater injury let him pay greater damages to the injured man, and less for the smaller injury; but in all cases, whatever the injury may have been, as much as will compensate the loss. And besides the compensation of the wrong, let a man pay a further penalty for the chastisement of his offense: he who has done the wrong mitigated by the folly of another, through the lightheartedness of youth or the like, shall pay a lighter penalty; but he who has injured another through his own folly, when overcome by pleasure or pain, in cowardly fear, or lust, or envy, or implacable anger, shall endure a heavier punishment. . . . [T]he law, like a good archer, should aim at the *right measure of punishment*, and in all cases at the *deserved* punishment [emphasis added].[5]

I should like to put the death penalty into this analysis of current trends in penal philosophy.

The Death Penalty

There is no rationale of punishment, or disposition of a convicted offender, that *requires* the death penalty. No logic of any rationale leads ineluctably to the death penalty.

Retribution would appear to contain the most reasonable logic leading to the death penalty. Part of the reasoning in retribution theory includes Hegel's notion of establishing an equilibrium, of restoring the state of being to what it had been before the offensive behavior had been committed. Strict homeostasis cannot be achieved with the death penalty, for, as we all know, the victim of a killing cannot be restored. Nor is the abstract sense of equilibrium satisfied by execution, that is, the *lex talionis*, eye for an eye, tooth for a tooth. For retribution requires pain equal to that inflicted on the victim, plus an additional pain for committing the crime, crossing the threshold from law-abiding to law-violative behavior.

The state's killing a convicted offender, especially under the medically protective circumstances now used, is not likely to cause him or her as much pain as that inflicted on the victim. Even if the pain were the same, the second requirement of retribution is not met, namely, the pain to be inflicted for the crime per se. What then could meet the requirement? A torturous execution? Perhaps, but that solution conflicts with other attitudes abroad in our society, particularly those concerned with physical assaults by or in the name of the state. Apparently, Western society considers corporal punishment an anathema of civilization. We permit the police to shoot at fleeing felons under certain circumstances, but even this act is discouraged unless life is endangered. Physical force may be used to arrest a suspect. But once a suspect is arrested, we mount glorious attacks against any physical abuse of arrestees, detainees, and defendants. We decry inadequate diets and urge good medical care for prisoners. The philosophy of our health delivery system is such that we must present our sacrifice to the rationalization for death in good physical condition. The state has made efforts to reduce the suffering of death in most exquisite ways.

Thus, there is a strong cultural opposition to corporal punishment. Western society today would not tolerate, I am sure, cutting off limbs, gouging out eyes, splitting the tongue. Even for murder, there would be opposition to "partial execution" (e.g., cutting off legs, cutting off the penis). If we cringe at the thought of eliminating part of the corporal substance, is it logical to eliminate the total corpus?

A principal part of the rationale of retribution is proportional sentencing. Beccaria, Bentham, and other rationalists recognized the principle. The just deserts or commensurate deserts model amply articulates it. Beccaria's scales of seriousness of crime and severity of sanction were meant to be proportional. Equal punishment for equal crime means not that the punishment should be exactly like the crime, but that the *ratios of sanction* severity should have a corresponding set of ratios of crime seriousness.

Moreover, punishment can or should be expressed in *equivalences* rather than in the same physical form of the crime. For example, we do not prescribe state-inflicted injuries for offenders who have injured but not killed their victims. It is not banal to argue this point because it is critical to the logic of capital punishment. If the victim has been assaulted and then treated by a physician and discharged, or is hospitalized, the state does not exact the same penalty for the offender. We do not in the name of the state stab, shoot, throw acid, maim, or mug persons convicted of such aggravated assaults. Where, then, is the rational logic for retention of the death penalty for inflicting death?

Instead, *equivalences in pain are sought in kind, not in physical exactitude.* The common commodity of pain in our democratic society is deprivation of liberty over time, measured in days, months, years. Other forms of deprivation are subsumed under this deprivation. It is but a reasonable extension of the equivalences between deprivation of liberty for crimes less than murder and the same deprivation for longer periods of time for the crime of homicide.

Proportionality and Deprivation of Liberty

Cesare Beccaria, in his classic essay, *Dei delitti e della pena (On Crime and Punishment)*, 1764, wrote that there should be a scale of the seriousness of crime with a corresponding scale of the severity of sanctions. In the Age of Reason in the eighteenth century, with an emphasis upon the rationality of humans, deterrence was the principal purpose of punishment. And Beccaria wrote poignantly about this rationale. One of his major statements, which surely has contemporary value, was that it is not the severity but the certainty of punishment that deters.

Despite Beccaria's focus on deterrence as the main purpose of punishment, the *principle of proportionality* between the gravity of the crime and the severity of the sanction was an integral part of his philosophy and can be applied to the just deserts model. The principles of proportionality, equivalences, and punishment based on what is deserved all are

now linked in a way that permits construction of a logical sequencing or scaling of sanctions.

Thomas Jefferson knew of Beccaria's essay and in his first inaugural address proposed what he called "equal and exact justice to all men." In 1779 he drafted "A Bill for Proportioning Crimes and Punishments." For example,

> Whosoever shall be guilty of rape, polygamy or sodomy with a man or woman, shall be punished, if a man, by castration, if a woman, by cutting through the cartilage of her nose a hole of one half inch in diameter at the least.

He also wrote:

> Whosoever on purpose, and of malice aforethought, shall maim another, or shall disfigure him, by cutting out or disabling the tongue, slitting or cutting of a nose, lip, or ear, branding, or otherwise shall be maimed, or disfigured, in *like sort*; or if that cannot be, for want of the same part, then *as nearly as may be*, in some other part of at least equal value and estimation, in the opinion of the jury, and moreover shall forfeit one half of his lands and goods to the sufferer.[6]

Although some of what Jefferson said may sound bizarre, he nonetheless nods in the direction of equivalences and proportionality.

I have tried to show elsewhere[7] that sanctioning equivalences took an important step forward when, in fourteenth century Florence, imprisonment became a form of punishment per se and essentially was meant to replace corporal punishment. Previously, prisons were used to detain defendants awaiting trial, flogging, branding, mutilation, exile, or banishment, but not as a punishment. In 1300 Florence opened its new prisons (Le Stinche) and, under the Ordinances of Justice of 1298, for the first time sentenced convicted offenders to the cells for definite, flat periods of time—*without* corporal punishment: two years for simple theft, four years for robbery, four years for sodomy (as I have found in the archives of the Uffizi for Benvenuto Cellini, although he never served his term) and so forth.

In the limited space available here, it is not possible to develop the thesis à la Jacob Burkhardt, or Georg Simmel with his theory of money, or Arnold Hauser on Renaissance art; the thesis claims that moving from the otherworldliness and timelessness of the Middle Ages to the this-worldly orientation, to an economy based on mercantile capitalism, to building the Pitti Palace during the lifetime of the patriarch of the Pitti family, to the chiming of clocks in the city piazzas, to new concise perspective in art, to Petrarch's climbing of Mt. Vesuvius just for the view, all converged to make equivalences of the labor, time, and money of individuals. Moreover, there was an effort to promote new political freedom. When time, labor, and money can be equated, when liberty becomes a precious commodity, then deprivation of liberty for given and specific amounts of time can become a disutility and a proper and just punishment.

In 1790 the Walnut Street Jail in Philadelphia opened a wing that was designated the State Prison. On October 29, 1829 the famous Eastern State Penitentiary was opened for prisoners and the term "penitentiary" came into use, a place for prisoners to do penance. Here was born the so-called Pennsylvania sys-

tem of punishment, which, like its Florentine counterpart, used imprisonment for specific periods of time as punishment sufficient unto itself—no more whippings, brandings, ducking stools, or corporal tortures. Specific periods of time in prison became equivalences for the gravity of crime.

The Rise of Reformation of Rehabilitation

But there was a corollary trend that had roots in older philosophies about the capacity to reform, remold, rehabilitate, resocialize the offender. The nation began to flourish in the telic posture of the nineteenth century.

There was an increase in psychiatric concern with criminality. Isaac Ray[8] (1838) wrote in his famous treatise on medical jurisprudence about insanity and criminal responsibility. Following him were the writings of Sigmund Freud and others that increased the psychiatrization of the criminal law. The medical guild linked with the legal guild in criminal justice and convinced the administrators of criminal law that offenders could be reformed, rehabilitated, remolded, and resocialized, thereby producing a decrease in criminality. In 1870 the American Prison Association met in Cincinnati, Ohio, and declared that the principal purpose of punishment was reformation. From that time on, through six decades of the twentieth century, criminal justice was primarily oriented toward this rationale.

Offenders were to be treated, not punished. Punishment became viewed as barbaric, treatment as humane. Individualization of punishment to meet the personality needs of individual offenders, the indeterminate sentence (two to four, four to eight years) or the indefinite sentence of one day to life, became common because we cannot know at the time of sentencing how long it will take to reform the offenders. We release them from societal custody at the most propitious time, namely, when we have "cured" them. The offender becomes the therapist's prisoner. Such has been the liturgy of rehabilitation.

Coercive reformation thus began and later changed its language but not its style. The invasion by medicine, especially psychiatry, of the philosophy of responsibility and of the "reasonable man" changed sin and evil to sickness and disease. The subconscious and unconscious came to dominate cognitive reasoning and offenders were to be treated rather than punished. It was not the sin in the soul but the disease in the mind that needed to be changed, and mind-altering mechanisms were invented to remold, refashion, and reform offenders for their own good as well as for the protection of society.

It is doubtful that this model and these messages of reform were ever fully accepted in the popular culture. But when the heavy weight of authority from the well-respected academies of medicine and law joined to promote policies of criminal justice, the voices of punishment and retribution from the folk culture remained hushed for over a century.

Questioning the Rehabilitation Model

There were voices of dissent in earlier periods, but they were not heeded until

very recently. As I mentioned earlier, in the nineteenth century the Philadelphia Quakers, the elite leaders, introduced at the old prison in Cherry Hill what came to be known as the Pennsylvania, or separate, system. In that prison all inmates, all convicts were kept in solitary confinement from the moment they arrived until the moment they left the institution. With humanitarian intentions to promote self-reformation and to eliminate the effects of social contamination from other convicts, this philosophy and correctional movement were imposed on the criminal justice system and enforced, as Rousseau would force humans to be free, on the unfortunates caught in a network of the administration of criminal law.

Charles Dickens visited the famous Philadelphia prison in 1842. At first he was complimentary, but when he put his impressions into writing he was very critical, and his perspective is as current as the critics of today who are opposed to coercive therapy:

> In its intention I am well convinced that it is kind, humane and meant for reformation; but I am persuaded that those who devised the system and those benevolent gentlemen who carry it into execution, do not know what it is they are doing .... I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh, because its wounds are not on the surface, and it extorts few cries that human ears can hear; therefore I denounce it as a secret punishment.[9]

Much later C. S. Lewis, in his essay, "The Humanitarian Theory of Punishment," wrote as follows:

> They are not punishing, not inflicting, only healing. But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the humanitarian theory has thrown overboard.[10]

Beginning in the mid-1950s a new skepticism about the efficacy of the medical, rehabilitation model developed. This was a behavioral science skepticism that gradually accumulated. But a parallel ethical concern emerged that questioned the justice of that model and raised the major issue of equity—or the lack of equity—in the hypocrisy of rehabilitation. Here, then, came the convergence of science, ethics, and the law.

Careful studies began to evaluate the efficacy of the rehabilitation model. As these studies increased in statistical sophistication, they increasingly reported negative conclusions, namely, that intervention techniques from individual to group therapy, reduced case loads for probation and parole officers, and other intervening models had no significant effect in reducing recidivism.[11] In 1975 a major report[12] of 289 studies of rehabilitation and intervention was made showing that no therapy significantly

contributed to the reduction of recidivism. Since that report and Robert Martinson's article in the *Journal of Public Interest* entitled "What Works?", there has been an increasing disillusion with the rehabilitation model.[13]

The Struggle for Justice (1971)[14] was a major report by the American Friends Service Committee that had earlier questioned the rehabilitation model and was primarily concerned with the enormous disparities in criminal sentencing and suggested greater uniformity. Since that time, and with the impact of articles by distinguished authors such as Frances Allen[15] and Herbert Packer,[16] there has grown a social policy assertion that the uniformity of sentencing and a decrease in judicial discretion are necessary attributes for promoting greater justice in our criminal policy. The Goodell Committee for the Study of Incarceration, whose report was recently published by Andrew von Hirsch under the title *Doing Justice*,[17] has expressed explicitly the growing public concern and disillusion with rehabilitation and a desire to produce a criminal justice system based upon the just deserts model, which means that criminals should be punished not for what they might do in the future but for what they have done in the past.

The Neoclassical Revival

Current thinking[18] among many jurists, police, and legislators is that we cannot do much about the "root causes" of crime, nor that government at any level can legislate love or affect the rate of broken homes. Unemployment, low levels of education, poor housing, and similar social problems among the working classes are issues that the government can and should try to change *sui generis* with only secondary reference to crime and only because they are major issues concerned with social welfare.

On another level, the criminal justice system is capable of direct manipulation, and governments should make efforts to effect change. These changes involve the following: increase in the probability of arrest and conviction and a positive sanction of incarceration for offenders who have committed offenses of injury, theft, or damage; elimination of the indeterminate or indefinite sentence by judges and reduction of judicial discretion at the point of sentencing; inclusion of the juvenile record for adults who are convicted and about to be sentenced so that the seriousness of crimes committed as juveniles will be considered in the sentencing discretion; decrease of judicial discretion, which should be substituted by a uniform sentencing process based upon the seriousness of the crime committed rather than on characteristics of the offender.

A report of the National Academy of Sciences Panel on Deterrence and Incapacitation concludes by saying that the evidence on deterrence—certainty, severity, and celerity—is so inadequate that no definite conclusion can be made. Recommendations for further research on longitudinal studies of criminal careers are made about the probability of arrest, of conviction, of incarceration. Another panel of the Academy on rehabilitation drafted a report that in effect

says:

> In general the research to date on rehabilitation tends strongly to confirm the previous conclusion that weak methodology makes for expensive research. The thousands of extant studies of rehabilitation add up scarcely to a single trustworthy conclusion. In short, we do not in truth know whether rehabilitation may be successfully effected, we do not know a dependable way of effecting rehabilitation. . . .

And we also do not know that rehabilitation *cannot* be accomplished.

Under the just deserts conceptualization there is no expectation of rehabilitation. In fact, David Rothman,[19] who gave us one of our best histories of asylums, refers to the concept of a failure rather than a success model as being more appropriate to punishment. However, under the current mode of thinking, therapy and service programs should continue to be available but on an optional basis, and participation in these programs should have no effect on the time of release for any convicted offender. Because of the excessive and intolerable number of false positives, the prediction of dangerousness would remain as an academic exercise only and should not be included in a criminal justice system. Even if we were able to predict future violent behavior, it would be inappropriate for us to determine the length of a sentence or the degree of restraint based upon future expectations. *Offenders should be punished for what they have done, not for what they might do.*

Punishment, even retribution, now becomes acceptable as a basis for justice. The Durkheimian conceptualization is reintroduced as a reinforcement of the community moral sentiments and not necessarily as a vengeful reaction by the madding crowd. Humane treatment in and out of prison is highly emphasized, as is the likelihood of fewer prison sentences, and then only or mainly for violent, assaultive offenders. The use of fines such as "income days," restitution to victims, and the right to be treated as well as the right *not* to be treated are fundamental principles of the system. Definite sentences rather than indefinite or indeterminate sentences constitute a core item in the agenda, whereas parole or aftercare from an institution would be eliminated as an institutional procedure and as a part of the criminal justice bureaucracy. Helping agencies that currently exist could be augmented for assistance to persons released from prison, but not under coercion.

Only now, with the revival of the eighteenth century classical position, are muted public tones being heard and articulated by leaders in social science, criminal law, and public policy. Neoclassicism was born from the popular culture and is now nourished by sophisticated research. Deterrence, retribution, and punishment, never abandoned by the populace, have once again become acceptable to those "with power to enforce their beliefs." Reformation, although still accepted as desirable, is dethroned from its position of dominance and is subordinated within a more retributive penology.

Rehabilitation will surely continue and will be researched but in a noncoercive style. Imprisonment should be used as infrequently as justice can design, and

humane concern for victims, by means of such programs as victim compensation and counseling, as well as concern for captured criminals, should govern our democratic justice system. The public, the police, the judiciary, and the legislators are now joined by many social scientists in an ethical stance that requests retribution, not revenge, as the definition of justice; that requires an emphasis on stability rather than on law and order; that looks to certainty rather than to severity of punishment.

Summary

The current conviction about crime and punishment is the neoclassical revival, the emphasis on just deserts. Society can neither deter nor rehabilitate nor properly predict future dangerousness or violent behavior. The best predictor of criminal violence is past criminal violence, but even this is faulty in overpredicting or having too many false positives of violence.

Justice requires equity, with precise penalties announced in advance, or what is called presumptive sentencing by the legislative body. If there is any general deterrence or incapacitation of specific individuals, this is a luxury addendum but not the purpose of punishment. Just deserts may also mean justice for the victim through restitution or compensation as well as just deserts for the offender. In short, just deserts as retribution is the most current trend that is supported by science and ethics.

The empty cup of our ignorance has often been filled not with facts and knowledge but with good intentions. But if maintaining the integrity of equity, equivalence, and proportionality is our goal, then penal sanctions based on the gravity of crime alone is our single salvation.

Within that framework but not imposed *over* the just deserts model, the healing arts and disciplines of knowledge about how to socialize and resocialize criminal offenders must continue. Psychiatry, psychology, psychotherapy, neurology, even endocrinology are the medical allies, whose fuller capacities to understand and to treat have not adequately flourished in the criminal justice system. Whereas the just deserts model provides limits, it should not abandon but indeed should encourage and promote the best efforts we can mount to offer rehabilitative treatment for offenders whom we now hold accountable for their crimes.

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